Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 2 June 2022 [1]

Joined Cases C-148/21 and C-184/21

Christian Louboutin
v
Amazon Europe Core Sàrl,
Amazon EU Sàrl,
Amazon Services Europe Sàrl (C-148/21)
(Request for a preliminary ruling
from the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg))
and
Christian Louboutin
v
Amazon.com Inc.,
Amazon Services LLC (C-184/21)

(Request for a preliminary ruling from the tribunal de l'entreprise francophone de Bruxelles
(Brussels Companies Court (French-speaking), Belgium))

(References for a preliminary ruling – Intellectual property – Trade mark law – Effects of the EU trade mark – Rights conferred by a trade mark – Right to prohibit the use by a third party of any sign which is identical with or similar to the trade mark in relation to goods or services which are identical or similar – Concept of 'use')

I. Introduction

1. While the issue of the liability of intermediaries is not in itself new, the situation is constantly changing as new forms of intermediation emerge in the internet sector. This is evidenced by the variety of cases concerning the activity of internet platforms which have been brought before the Court in recent years, [2] in the wake of which the present requests for a preliminary ruling have been brought in connection with proceedings between Mr Christian Louboutin and Amazon Europe Core Sàrl, Amazon EU Sàrl and Amazon Services Europe Sàrl (Case C-148/21), and Amazon.com Inc., and Amazon Services LLC (individually or jointly 'Amazon') (Case C-184/21).

[1] Original language: French.

[2] See, for example, judgments of 20 December 2017, *Asociación Profesional Élite Taxi* (C-434/15, EU:C:2017:981, 'judgment in *Asociación Profesional Elite Taxi*'); of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112); and of 22 June 2021, *YouTube and Cyando* (C-682/18 and C-683/18, EU:C:2021:503).

2. This emergence is not surprising. The internet occupies an increasingly prominent place in our society from both an economic and a social point of view, and the intermediaries that operate on it play an essential role in that regard. Those intermediaries enable users to find, exchange, share and produce content, to buy and sell products and services and to create and express themselves on the internet. [3] In short, they make it easier for users to access certain content. Although online intermediaries may, to a certain extent, represent the virtual counterpart of traditional intermediaries, the internet sector, which is characterised by constant technological innovations, encourages in particular the creation of new models for intermediation which have no equivalent in the real world [4] and which are of obvious practical importance, thereby demonstrating the need for the law to reflect this.

3. The increasing role of online intermediaries necessarily implies that their activities merge with those of other operators and that those activities may, to a certain extent, constitute a threat to their rights. That is the case with regard to operators which hold intellectual property rights – in particular proprietors of a trade mark – since those rights may be infringed on online sales platforms, for example, with the result that the question arises as to the liability of online intermediaries operating such platforms. The development of the activities of online sales platforms and the accompanying technological innovations increase the accessibility of goods for consumers and encourage their marketing. The volume of goods in circulation therefore increases automatically. This also applies to counterfeit goods. [5]

4. It makes sense to examine the liability of the intermediary operating an online sales platform for the sale of counterfeit goods via that platform from the point of view of the proprietor of a trade mark which has been infringed on that platform. It is true that the infringement is, primarily, committed by the seller using the online sales platform to offer counterfeit goods for sale. However, as a general rule, those sellers are difficult to identify and their location may also prevent them from being held liable. [6]

5. The intermediary, for its part, makes that infringement by a third party technically possible and has control over its platform. It can therefore, in principle at least, put an end to that infringement. It therefore appears to be more effective, for the proprietor of a trade mark to seek to establish the liability of the intermediary rather than the third-party seller, [7] whether it be direct liability – as an infringer – or indirect liability – as a result of the actions of third parties via its services. [8]

3 Ullrich, C., *Unlawful Content Online, Towards a New Regulatory Framework for Online Platforms*, Luxemburger Juristische Studien, Nomos, Baden-Baden, 2021, p. 32.

4 Marsoof, A., *Internet intermediaries and Trademark Rights*, Routledge Research in Intellectual Property, Abingdon, 2019, p. 2.

5 The volume of counterfeit goods in circulation worldwide now represents around 2.5% of world trade. See OECD/EUIPO, *Global Trade in Fakes, A Worrying Threat*, Illicit Trade, OECD Publishing, Paris, 2021, p. 64.

6 Van Eecke, P., 'Online service providers and liability: A plea for a balanced approach', *Common Market Law Review*, 2011, No 48, Vol. 5, p. 1455.

7 With regard to the theoretical and economic justifications for seeking to establish the liability of online intermediaries, see Marsoof, A., op. cit., pp. 5 to 10; Ullrich, C., op. cit., pp. 104 to 108; and Ohly, A., 'The Liability of Intermediaries for Trademark Infringement', *Research Handbook on Trademark Law Reform*, Dinwoodie, G.B., and Janis, M.D., (eds), Edward Elgar Publishing, Cheltenham, 2021, pp. 396 to 430.

8 With regard to the distinction between primary liability and indirect liability, see Opinion of Advocate General Jääskinen in *L'Oréal and Others* (C-324/09, EU:C:2010:757, point 54 et seq.), or even Kur, A. and Senftleben, M., *European Trade Mark Law: a Commentary*, 2017, Oxford University Press, Oxford, 2017, p. 691, and Ullrich, C., op. cit., p. 356 et seq.

6. The interest of trade mark proprietors in establishing the liability of intermediaries cannot be viewed in isolation, however, and cannot in itself warrant the view that intermediaries should always be held liable for infringements of trade mark proprietors' rights on their platforms. That interest must be balanced against other conflicting interests. [9]

7. In the first place, the extent of the liability of online intermediaries could require them virtually to perform general monitoring of any potential infringement of trade mark law on their platforms. In the second place, and in the same vein, to accept that online intermediaries may be held directly liable for infringements of trade mark proprietors' rights on their platforms could hinder the development of new activities in the internet sector and, more broadly, any form of innovation in that area.

8. The need to reconcile those divergent interests has led the EU legislature to adopt measures to protect, to a certain extent, online intermediaries in respect of their liability for the actions of third parties on their platforms – that is to say their indirect liability. Although indirect liability is not subject to harmonised rules in EU law, Directive 2000/31/EC [10] nevertheless provides for exemptions from liability which must be implemented by the Member States. In particular, online intermediaries cannot be held liable for the unlawful conduct of users of their platform in the context of their activity of transmitting information in a communication network and providing access to that network, their storage known as 'caching', or even in their hosting activity. [11] Furthermore, in the context of those same activities, those intermediaries cannot be placed under a general obligation to monitor the information which they transmit or store, or actively to seek facts or circumstances indicating illegal activity. [12]

9. Moreover, while Directive 2004/48/EC [13] provides that Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, [14] those injunctions aimed at bringing such an infringement to an end are, however, independent of any liability on the part of the intermediary in relation to the facts at issue, [15] with the result that the question of the treatment of intermediaries in the acts committed by third parties via their services is largely missing from that directive.

10. Beyond the question of their indirect liability, it remained to be determined whether online intermediaries could be held directly liable for infringements of trade mark proprietors' rights, in particular in respect of operators of online marketplaces, on account of the presence of offers for sale of counterfeit goods on their platform. In contrast to the indirect liability of online intermediaries, the rules for which are governed by national law subject to the exemptions from

9 Ohly, A., op. cit., p. 397.

10 Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

11 Articles 12, 13 and 14 of the Directive on electronic commerce.

12 Article 15 of the Directive on electronic commerce.

13 Directive of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45 and corrigendum OJ 2004 L 195, p. 16).

14 Article 11 of Directive 2004/48.

15 See judgment of 7 July 2016, *Tommy Hilfiger Licensing and Others* (C-494/15, EU:C:2016:528, paragraph 22). On that issue, see also Husovec, M., *Injunctions against Intermediaries in the European Union, Accountable but not Liable*?, Cambridge University Press, Cambridge, 2017, p. 62 et seq.

liability provided for in the Directive on electronic commerce, the direct liability of marketplace operators for infringement of the rights of trade mark proprietors on those marketplaces does fall within the scope of EU law and, more specifically, Regulation (EU) 2017/1001. [16]

11. It was therefore for the Court to balance the interests involved itself by delineating situations in which a marketplace operator may be directly liable and those in which that operator cannot be held directly liable for an infringement of the rights of a trade mark proprietor on the platform which it operates. The Court's case-law on the interpretation of Article 9(2) of Regulation 2017/1001 [17] has to some extent made it possible, by clarifying the concept of 'use' of the trade mark in the course of trade, to establish such a boundary, [18] in so far as that concept is intended to determine the behaviour which the proprietor of a trade mark may prohibit on the part of a third party.

12. However, constant innovations in the internet sector, for which the need for safeguarding warranted far-reaching protection of intermediaries' activities in this area, have also brought about considerable changes in the model for online marketplaces. Amazon, in particular, cannot be regarded as a traditional marketplace.

13. As noted by the referring courts, Amazon is both a renowned distributor and a marketplace operator. Amazon publishes on its online shop both advertisements relating to its own goods, which it sells and ships under its own name, and advertisements from third-party sellers. Its business practices also allow for the shipping of goods offered for sale by third-party sellers on its platform to be handled by those sellers or by Amazon, which stocks those products in its distribution centres and ships them to purchasers from its own premises.

14. Those factors, which make that company's model a 'hybrid' one, [19] constitute a new framework for analysing whether the operator of such a marketplace can be held directly liable for the infringement of the rights of trade mark proprietors on its platform, in that it has allegedly made use of that trade mark for the purposes of Article 9(2) of Regulation 2017/1001, and form the basis of the questions referred for a preliminary ruling in the present cases.

15. The present cases therefore offer the Court the opportunity to clarify the concept of 'use' and, accordingly, the principles which must govern the question as to the direct liability of online intermediaries where an infringement of trade mark rights occurs on their platform.

II. Legal framework

A. Regulation 2017/1001

16. Recital 13 of Regulation 2017/1001 states:

'Confusion as to the commercial source from which the goods or services emanate may occur when a company uses the same or a similar sign as a trade name in such a way that a link is established between the company bearing the name and the goods or services coming from that

[16] Regulation of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

[17] Or, before it, Regulation (EC) No 207/2009 of the Council of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

[18] See the analysis of that case-law in point 49 et seq. of this Opinion.

[19] Ohly, A., op. cit., p. 413.

company. Infringement of an EU trade mark should therefore also comprise the use of the sign as a trade name or similar designation as long as the use is made for the purposes of distinguishing goods or services.'

17. Article 9(1) to (3) of Regulation 2017/1001, entitled 'Rights conferred by an EU trade mark', provides:

'1. The registration of an EU trade mark shall confer on the proprietor exclusive rights therein.

2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of that EU trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

(a) the sign is identical with the EU trade mark and is used in relation to goods or services which are identical with those for which the EU trade mark is registered;

(b) the sign is identical with, or similar to, the EU trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the EU trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) the sign is identical with, or similar to, the EU trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the EU trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark.

3. The following, in particular, may be prohibited under paragraph 2:

…

(b) offering the goods, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services thereunder;

…

(d) using the sign as a trade or company name or part of a trade or company name;

(e) using the sign on business papers and in advertising;

(f) using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC.' [20]

[20] Directive of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21).

B. Directive 2004/48

18. Article 11 of Directive 2004/48, entitled 'Injunctions', provides:

'Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.' [21]

19. Article 13 of that directive, entitled 'Damages', provides:

'1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

…

2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.'

C. Directive on electronic commerce

20. Recital 48 of the Directive on electronic commerce states:

'This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.'

21. Article 14 of that directive, entitled 'Hosting', provides in paragraph 1 thereof:

'Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;

or

[21] Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.'

III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedures before the Court

22. Mr Louboutin is a French designer of footwear whose best-known goods are high-heeled women's shoes. Since the mid-1990s, he has affixed to his shoes an outer sole painted in red (Pantone 18.1663TP).

23. That colour, applied to the sole of a high-heeled shoe, is registered as a Benelux trade mark, under number 0874489 and, as an EU trade mark, under number 8845539.[22] That trade mark is protected for 'High-heeled shoes (except orthopaedic footwear)'.

24. Amazon is a company that specialises in offering for sale online various goods and services, both directly on its own behalf and indirectly as a sales platform for third-party sellers.

25. The Amazon websites regularly display advertisements for red-soled shoes which Mr Louboutin claims relate to products which have been placed on the market without his consent.

A. Case C-148/21

26. By a writ served by a bailiff on 19 September 2019, Mr Louboutin, relying on an infringement of the exclusive rights conferred by his EU trade mark, instructed Amazon's subsidiaries, which have a head office in Luxembourg, to appear before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg), sitting in commercial matters. Mr Louboutin sought a declaration that (i) Amazon is liable for infringement of his trade mark, (ii) it should cease the use, in the course of trade, of signs identical to that trade mark throughout the territory of the European Union, with the exception of the Benelux territory which is covered by a decision by the Belgian court, failing which it must make a periodic penalty payment, and (iii) he is entitled to damages for the harm caused by the unlawful use at issue.

27. Mr Louboutin's claims are based on Article 9(2)(a) of Regulation 2017/1001. He submits that Amazon has used, without his consent, a sign that is identical with the trade mark of which he is the proprietor for goods or services which are identical with those for which that trade mark is registered, on account of, inter alia, it displaying, on that company's online stores, advertisements relating to goods bearing the sign at issue, but also on account of the stocking, shipment and delivery of those goods. According to Mr Louboutin, such use is attributable to Amazon in so far as that company has played an active role in the commission of the acts constituting that use and it was where the advertisements relating to the counterfeit goods formed part of its own commercial communication. He states that Amazon cannot therefore be regarded as a mere host or a neutral intermediary.

[22] According to the registration, 'the trade mark consists of the colour red (Pantone 18.1663TP) applied to the sole of a shoe as shown (the outline of the shoe is therefore not part of the trademark but serves to show the positioning of the trade mark)'.

28. Amazon challenges whether the use of the trade mark can be imputed to it. It relies on several judgments of the Court relating to other platforms, such as eBay, to claim that, as an online marketplace operator, it cannot be held liable for the use of that trade mark by sellers who use its platform. It claims that the business practices of its marketplace, to which third-party sellers have access, are not significantly different from that of other marketplaces and that the fact that Amazon's logo is included in those sellers' advertisements on its websites does not mean that it adopts those advertisements. According to Amazon, the ancillary services offered by it should not justify the classification of third-party commercial offerings as part of its own communication. It claims that the fact that a service provider creates the technical conditions necessary for the use of a sign and is remunerated for that service does not mean that the provider of that service itself makes use of that sign.

29. According to the referring court, it is necessary to determine whether the particular way in which the platforms operated by Amazon function may result in the use of a sign that is identical with the trade mark because of the integration of third-party sellers' advertisements into the commercial communication of that company.

30. In the first place, the national court refers to the judgment in *L'Oréal and Others*,[23] 'the judgment in *eBay*', in which the Court held that, if a sign identical with, or similar to, the proprietor's trade mark is to be 'used' by a third party, that implies, at the very least, that that third party uses the sign in its own commercial communication, in order to conclude that an operator of an online marketplace does not make such use. However, that court argues that, in so far as that judgment concerned the eBay platform, which is known to be involved in the publication of its users' advertisements not as a seller and distributor, but solely as an intermediary, that case-law is not, in its view, transposable *ipso facto* to a platform with different business practices.

31. The referring court is of the opinion, in that regard, that it should not consider each element of the commercial offerings as presented on Amazon's websites in isolation, but assess the strategy as a whole in order to determine whether the sales model put in place by that company might be different from that of a marketplace in the strict sense and might, where appropriate, give rise to different responsibilities.

32. That court submits that, despite an extensive body of case-law, the Court of Justice has never ruled on the question whether an online distributor of goods, which at the same time operates an online marketplace, may be regarded as incorporating third-party commercial offerings in its own commercial communication. That case-law proceeds from the premiss that third-party advertisements do not form part of the platform operator's own commercial communication, which, in the present case, leads to the finding that Amazon is solely an operator of an online marketplace.

33. The referring court notes that, in the judgment in *Coty Germany*,[24] the Court addressed that question solely from the aspect of the stocking of goods, without envisaging a broader analysis of Amazon's business model, with the result that the Court is not said to have adopted a position on the problem referred to it in the present case, which not only concerns the stocking by Amazon of goods sold by third parties, but also raises a wider issue, namely that of whether the commercial offerings of third parties must be considered as being integrated by Amazon into its own commercial communication.

[23] Judgment of 12 July 2011 (C-324/09, EU:C:2011:474).

[24] Judgment of 2 April 2020 (C-567/18, EU:C:2020:267, 'judgment in *Coty*').

34. The referring court adds that the fact that that wider issue might, if necessary, find a solution in the EU legislation on electronic commerce, does not make it possible to rule out with certainty the intermediary's liability in respect of the protection of trade marks.

35. In the second place, that court asks whether, with regard to the more or less active role played by the marketplace operator in the publication of advertisements, the public's perception may be significant. More specifically, it seeks to ascertain whether the fact that the public perceives an advertisement or commercial offering from a third party as part of a digital sales platform operator's own communication amounts to a genuine incorporation of the commercial offering in that operator's own commercial communication, thereby rendering the operator liable under trade mark law.

36. Finally, in the third place, the referring court asks whether an operator must be considered as using a sign by shipping goods bearing the sign at issue. It considers that, in the judgment in *Coty*, the Court did not rule on the shipping of the goods following their storage in so far as, in the case which gave rise to that judgment, the shipping was carried out by an external service provider.

37. In those circumstances, the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 9(2) of [Regulation 2017/1001] to be interpreted as meaning that the use of a sign identical with a trade mark in an advertisement displayed on a website is attributable to the website operator or to entities economically linked with it owing to the combination on that website of the operator's or its economically linked entities' own offers and those of third-party sellers, by the incorporation of those advertisements in the operator's or its economically linked entities own commercial communication?

Is such incorporation strengthened by the fact that:

– the advertisements are presented uniformly on the website?

– the operator's own advertisements and those of economically linked entities and the advertisements of third-party sellers are displayed without distinction as to their origin, but clearly display the logo of the operator or of economically linked entities, in the advertising categories of third-party websites in the form of "pop-ups"?

– the operator or economically linked entities offer a comprehensive service to third-party sellers, including providing assistance in preparing the advertisements and setting selling prices, stocking the goods and shipping them?

– the website of the operator and economically linked entities is designed in such a way as to be presented in the form of shops and labels such as "best sellers", "most sought after" or "most popular", without apparent distinction, at first sight, between the operator's and economically linked entities' own goods and third-party sellers' goods?

(2) Is Article 9(2) of [Regulation 2017/1001] to be interpreted as meaning that the use of a sign identical with a trade mark in an advertisement displayed on an online store is, in principle, attributable to its operator or to economically linked entities if, in the perception of a reasonably well-informed and reasonably observant internet user, that operator or an

economically linked entity has played an active role in the preparation of that advertisement or if that advertisement is perceived as forming part of that operator's own commercial communication?

Is such a perception influenced by:

– the fact that that operator and/or economically linked entities is a well-known distributor of a vast range of goods, including goods in the category of those featured in the advertisement; or

– the fact that the advertisement thus displayed shows a heading in which the service mark of that operator or economically linked entities is reproduced, that mark being well known as a distributor's mark; or

– the fact that that operator or economically linked entities offer, together with that display, services traditionally offered by distributors of goods in the same category as that to which the goods featured in the advertisement belongs?

(3) Must Article 9(2) of [Regulation 2017/1001] be interpreted as meaning that the shipment, in the course of trade and without the consent of the proprietor of a trade mark, to the final consumer of goods bearing a sign identical with the mark, constitutes use attributable to the shipper only if the shipper has actual knowledge that the sign has been affixed to the goods?

Is such a shipper the user of the sign concerned if the shipper itself or an economically linked entity has informed the final consumer that it will undertake the shipment after it or an economically linked entity has stocked the goods for that purpose?

Is such a shipper the user of the sign concerned if the shipper itself or an economically linked entity has previously made an active contribution to the display, in the course of trade, of an advertisement for the goods bearing that sign or has taken the final consumer's order on the basis of that advertisement?'

38. The request for a preliminary ruling was received at the Court on 8 March 2021. Written observations were submitted by the parties to the main proceedings, the German Government and the European Commission. The same parties, with the exception of the German Government, participated in the hearing held on 22 February 2022.

B. Case C-184/21

39. On 4 October 2019, Mr Louboutin brought before the tribunal de l'entreprise francophone de Bruxelles (Brussels Companies Court (French-speaking), Belgium) an action seeking an injunction against the use of his trade mark by Amazon and for damages for the harm caused by its use.

40. In support of his action, Mr Louboutin relies on the same arguments as those put forward in Case C-148/21, emphasising in particular the fact that the advertisements at issue, first, form an integral part of Amazon's commercial communication, since they show, at the top of each advertisement, Amazon's semi-figurative trade mark, which is a trade mark of a highly renowned distributor, and, secondly, resemble, in their composition, the normal advertisements of large distributors. Mr Louboutin also submits that when examining whether an advertisement forms an integral part of a given person's own commercial communication, it is necessary to take into

account the perception of the reasonably well-informed and reasonably observant consumer for whom that advertisement is intended. He also submits that the act of shipping to a purchaser goods bearing a sign identical with a trade mark constitutes an act of use of that sign.

41. In response, Amazon submits that the commercial offering of what are alleged to be counterfeit shoes published by third-party sellers on its websites and the shipping of those shoes sold by those third-party sellers do not constitute use of the trade mark by Amazon and that, according to settled case-law, it cannot be held liable, as the operator of an online marketplace, for the (unauthorised) use of a trade mark by third parties. Amazon refers, in that regard, to a recent judgment of the Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) [25] in which that court held that 'the use of the trade mark in an advertisement for the sale of counterfeit goods from a third-party seller is not attributable to the operator of the online marketplace – even if the latter's identity is visible – because it does not form part of its own commercial communication'.

42. The referring court considers that the issues, first, of the circumstances in which the use of an infringing sign in an advertisement might be attributed to the operator of an online shop which is also a distributor and, secondly, whether, and in what circumstances, the perception of the public by reference to that advertisement must be taken into account in order to determine the attributability of such use, are relevant for the resolution of the dispute before it. According to that court, the same applies to the question of the circumstances surrounding the shipping of goods bearing a sign which infringes a trade mark, which, in its view, is necessary for the purposes of determining the application of Article 9(2) of Regulation 2017/1001 in the present case.

43. It is in those circumstances that the tribunal de l'entreprise francophone de Bruxelles (Brussels Companies Court (French-speaking)) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 9(2) of [Regulation 2017/1001] be interpreted as meaning that the use of a sign identical with a trade mark in an advertisement displayed on a website is, in principle, attributable to its operator if, in the perception of a reasonably well-informed and reasonably observant internet user, that operator has played an active part in the preparation of that advertisement or if that advertisement may be perceived by such an internet user as forming part of that operator's own commercial communication?

Will such perception be influenced:

– by the fact that that operator is a well-known distributor of a wide range of goods, including goods in the category of those featured in the advertisement; or

– by the fact that the advertisement thus displayed presents a heading in which the service mark of that operator is reproduced, that mark being well known as a distributor's trade mark; or

– furthermore, by the fact that, as well as displaying that advertisement, that operator offers services traditionally offered by distributors of goods in the same category as that to which the goods featured in the advertisement belong?

[25] Judgment of 25 June 2020, in Case RG/2019/AR/1480.

(2) Must Article 9(2) of [Regulation 2017/1001] be interpreted as meaning that the shipment, in the course of trade and without the consent of the proprietor of a trade mark, to the final consumer of goods bearing a sign identical with the mark constitutes a use attributable to the shipper only if the shipper has actual knowledge that that sign has been affixed to those goods?

Is such a shipper the user of the sign concerned if the shipper itself or an economically linked entity has informed the final consumer that it will undertake the shipment after it or an economically linked entity has stocked the goods for that purpose?

Is such a shipper the user of the sign concerned if the shipper itself or an economically linked entity has previously made an active contribution to the display, in the course of trade, of an advertisement for the goods bearing that sign or has taken the final consumer's order on the basis of that advertisement?'

44. The request for a preliminary ruling was received at the Court on 24 March 2021. Written observations were submitted by the parties to the main proceedings and the Commission. Those parties participated at the hearing held on 22 February 2022.

IV. Analysis

45. I note that the questions referred to the Court in Cases C-148/21 and C-184/21 all relate to the interpretation of the concept of 'use' for the purposes of Article 9(2) of Regulation 2017/1001 and that the elements put forward in each of those questions largely overlap.[26] I shall therefore consider them together.

46. By their questions, the national courts seek to ascertain, in essence, whether Article 9(2) of Regulation 2017/1001 must be interpreted as meaning that the operator of an online sales platform must be regarded as using a trade mark in an offer for sale published by a third party on that platform on account of the fact that, first, it publishes both its own commercial offerings and those of third parties uniformly without distinguishing them as to their origin in the way in which they are displayed, by allowing its own logo as a renowned distributor to appear on those advertisements, and, secondly, it offers third-party sellers the additional services of stocking and shipping goods posted on its platform by informing potential purchasers that it will be responsible for those activities. The referring courts also ask the Court whether the perception of a reasonably well-informed and reasonably observant internet user has an impact on the interpretation of the concept of 'use' for the purposes of that provision.

47. In order to answer the questions referred, I shall begin by recalling the case-law on the 'use' of a trade mark, for the purposes of Article 9(2) of Regulation 2017/1001, in order to set out the reasons why I take the view that it follows from that case-law that the application of that concept implies that the perception of a user of the platform in question must be taken into account. I shall then analyse the implications of such a consideration where it is a matter of determining whether Amazon, on account of the particular features of its business practices, as described by the referring courts, uses a trade mark which appears in an offer for sale published by a third party on its website.

[26] See points 90 and 91 of this Opinion.

A. Determination of the analytical framework

48. Article 9(2) of Regulation 2017/1001, which reproduces the substance of Article 9(1) of Regulation No 207/2009, provides that the proprietor of an EU trade mark is entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trade mark, if that sign is used in relation to goods or services which are identical with those for which the trade mark is registered. The provisions of Regulation 2017/1001 do not, however, define the concept of 'use', with the result that the principles for the interpretation of that concept have been established by the case-law of the Court.

1. The definition provided in the case-law as it stands is insufficient

49. The Court has ruled that the term 'using', in Article 9(2) of Regulation 2017/1001, involves, on the part of the third party, an online intermediary, active behaviour and direct or indirect control of the act constituting the use.[27]

50. That requirement of active behaviour and control of the act constituting the use is apparent, first, from the wording of Article 9 of Regulation 2017/1001 since paragraph 3 of that provision lists in a non-exhaustive manner the types of use which the trade mark proprietor may prohibit and refers only to active behaviour on the part of the third party.[28] Secondly, it follows from the purpose of Article 5(1) of that regulation, which is intended to provide the proprietor with a legal instrument allowing him or her to prohibit and, therefore, to prevent any use of his trade mark by a third party without his or her consent. However, only a third party who has control of the act constituting the use is effectively able to stop that use.[29] That requirement is therefore the expression of the principle that nobody can be legally bound to do the impossible.[30]

51. Furthermore, the Court has consistently held that the act of use by an online intermediary presupposes, 'at the very least, that that third party uses the sign in its own commercial communication'.[31] That condition, which is a direct extension of the condition relating to engaging in active behaviour, lies, in my view, at the heart of the concept of 'use' in the case of an intermediary operating on the internet. It is a necessary condition for the recognition of the use of a sign, in the absence of which such use is lacking.

52. The condition relating to the use of the sign in an online intermediary's own commercial communication has also, to date, always ruled out use by that intermediary. Thus, the Court held, in the judgment in *Google*, that a referencing service provider does not use a sign in its own commercial communication since it allows only its clients themselves to use signs which are identical with a trade mark, with the result that it merely creates the technical conditions necessary for the use of a sign.[32] Likewise, the Court held, in the judgment in *eBay*,[33] that a marketplace operator does not use the sign at issue in its own commercial communication when it provides a service consisting in enabling its customers to display that sign in their commercial

27 Judgments of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 41), and of 2 July 2020, *mk advokaten* (C-684/19, EU:C:2020:519, paragraph 23).

28 Judgment of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 40).

29 Judgment of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 41).

30 See Kur, A., and Senftleben, M., op. cit., p. 276.

31 Judgment of 23 March 2010, *Google France and Google* (C-236/08 to C-238/08, EU:C:2010:159, paragraph 56, 'the judgment in *Google*'); judgment in *eBay* (paragraph 102); and judgment in *Coty* (paragraph 39).

32 Judgment in *Google*, paragraphs 56 and 57.

33 Paragraph 102 of that judgment.

activities and, in the judgment in *Coty*,[34] that the stocking of goods bearing the sign at issue is not a use of that sign in a third party's own commercial communication because that company has not itself offered the goods concerned for sale or put them on the market.

53. However, I note that the case-law of the Court has never provided a more thorough definition of that condition and that that question has also not been considered in more detail in legal literature,[35] with the result that it is not clear what is covered by the concept of 'use of a sign in an intermediary's own commercial communication'.[36] The exclusively negative use of that condition, which has served to demonstrate only that a sign has not been used even in the case which led to its discovery, largely accentuates that lack of precision.

54. Although, at first sight, it is therefore not easy when reading the case-law of the Court, to determine the meaning of the concept of 'use of a sign in an intermediary's own commercial communication' in the positive sense and how it can be established that such a condition has been met, a more careful analysis of the concept nevertheless makes it possible to delineate that concept.

2. The 'use of a sign in an intermediary's own commercial communication': a concept which necessarily incorporates the perspective of the platform user

55. The commercial communication of an undertaking generally designates any form of communication designed to promote its activity, goods or services or to indicate the exercise of such an activity. The purpose thereof is to introduce the activity of that undertaking, or bring it to the attention of, third parties. It therefore has a purely external purpose, the term 'communication' being commonly defined as the act of sharing something or making something known to someone.[37]

56. Therefore, communication arises only in a relationship between the undertaking using the sign and third parties, and the use by an online intermediary of a sign in its own commercial communication thus presupposes that the sign at issue appears, to those outside that undertaking, to be an integral part of that communication. In other words, the intermediary adopts the sign to such an extent that that sign appears to be part of its activity.

57. This idea is not new. The Court has held that there is use of a sign where the third party 'uses that sign in such a way that a link is established between the sign and the goods marketed or the services provided by the third party'.[38] Although the condition relating to the existence of such a

[34] Paragraph 47 of that judgment. With regard to the finding that a sign has not been used because of the absence of use of the sign in its own commercial communication other than in situations relating to online intermediaries, see also judgments of 15 December 2011, *Frisdranken Industrie Winters* (C-119/10, EU:C:2011:837), and of 16 July 2015, *TOP Logistics and Others* (C-379/14, EU:C:2015:497).

[35] As noted by some authors. See Marsoof, A., op. cit., p. 37; and Ullrich, C., op. cit., p. 358.

[36] With regard to the vagueness of the concept of 'use', see Kur, A. and Senftleben M., op. cit., p. 275.

[37] The term 'communication' evokes, for those familiar with intellectual property law, the concept of 'communication to the public' within the meaning of Article 3(1) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92). I will not, however, refer to the case-law on the interpretation of that concept in order to define the concept of 'commercial communication' as established by the case-law of the Court on the use of a sign. The concept of 'communication to the public' is an autonomous concept of EU law operating in a different context, in which the granting of access to a work is always potentially an infringement of an intellectual property right in itself, whereas the classification of a use can take place only in the course of trade and implies a more in-depth analysis.

[38] Order of 19 February 2009, *UDV North America* (C-62/08, EU:C:2009:111, paragraph 47).

link has not expressly been taken up since then with regard to online intermediaries and has been replaced by the condition relating to the use of the sign in the intermediary's own commercial communication, this is because that condition is underpinned by the same logic.

58. The condition relating to the use of the sign in commercial communication presupposes that the online intermediary uses that sign in such a way that the addressee of that communication makes a specific link between the intermediary and the sign in question,[39] that specific link resulting from the adoption of that sign by the intermediary.

59. That condition must therefore be analysed from the point of view of the user of the marketplace, who is the addressee of the commercial communication from the operator of that marketplace, in order to be able to determine whether the sign at issue is perceived by that user as being integrated into that commercial communication by virtue of the fact that the online intermediary has adopted that sign.

60. I note that the need to adopt the point of view of that user has already been emphasised by Advocate General Campos Sánchez Bordona in his Opinion in *Coty Germany*,[40] in which he indicated that he 'focus[es] on the point of view of an end consumer', and notes that 'to the extent that the buyer might form the impression that it is [the marketplace operator] which puts the goods on the market', a solution must be found which is 'is in favour of the proposition that the trade mark is used'.

61. It therefore seems to me to be inherent in the condition relating to the use of the sign in the intermediary's own commercial communication that that communication should be assessed from the point of view of its addressee, namely the internet user who uses the platform in question.

62. I must also clarify which user of the marketplace should serve as a reference in order to determine whether, from his perspective, the sign at issue is integrated by the operator into its own commercial communication. The referring courts suggest adopting the position of a 'reasonably well-informed and reasonably observant internet user'.

63. This expression echoes the standard adopted for determining whether the use of a sign by a third party adversely affects one of the essential functions of the trade mark. In the course of that examination, the Court determines essentially whether 'normally informed and reasonably attentive internet users [are able] to ascertain whether the [trade-marked] goods or services … originate from the proprietor of the trade mark or … from a third party'.[41]

64. It is true, as the Commission and Amazon point out, that the question of whether a marketplace operator uses a trade mark and that of whether that use is liable to have an adverse effect on one of the functions of the trade mark are two different questions.

65. As regards the second question, the analysis focuses on the goods or service bearing the sign at issue in order to determine whether a reasonably well-informed and reasonably observant consumer may wrongly consider that that sign originates from the proprietor of a trade mark. The first question consists not in examining the product or service bearing the sign in question,

[39] As Advocate General Kokott has already pointed out in her Opinion in *Frisdranken Industrie Winters* (C-119/10, EU:C:2011:258, point 28).

[40] C-567/18, EU:C:2019:1031, paragraph 53.

[41] Judgment in *Google*, paragraph 84.

but only in determining whether, in respect of the operator's commercial communication, the sign in question is perceived by the platform's users as being used directly by that operator in the course of its activity.

66. Those two types of examination also follow different rationales. The question of the infringement of one of the functions of the trade mark, in particular its function as an indication of origin, includes a protective dimension, not only of the rights of the trade mark proprietor, but also of the interests of consumers.[42] In contrast, the issue of determining the use of a trade mark involves only the relationship between the proprietor of the trade mark in question and an alleged infringer, since it seeks to determine whether, by its action, that third party exercises an exclusive prerogative of the trade mark proprietor.

67. However, those factors cannot justify not also taking into account the perception of a reasonably well-informed and reasonably observant internet user in order to determine whether the sign in question is incorporated into the commercial communication of an online sales platform. On the contrary, I am of the opinion that such an internet user, as the addressee of the platform operator's commercial communication, is necessarily the point of reference for determining whether an intermediary has adopted the sign by using it in its own commercial communication.

68. The existence of such a framework for analysing the use of a sign in an intermediary's own commercial communication and, therefore, the concept of the 'use' of that sign by online intermediaries is not called into question by the argument, put forward by Amazon and the Commission, that the Court has not expressly mentioned the need to take into account the perception of internet users in that regard.

69. In the first place, as I noted in points 52 and 53 of this Opinion, the concept of 'use of a sign in an intermediary's own commercial communication' has been used only negatively in situations where the Court has held that the intermediary had not used the sign at issue in such a way. Such a conclusion cannot therefore be drawn from the fact that no reference was made to the perception of an internet user in order to demonstrate that the sign at issue formed an integral part of the intermediary's commercial communication, in situations where that was not the case, since the analysis of the perception of the internet user is relevant only if there is doubt as to the use of the sign in the intermediary's own commercial communication.

70. In the second place, that is particularly so since the solution adopted by the Court in those judgments may, in any event, be justified on account of the fact that the sign at issue was not perceived by the reasonably well-informed and reasonably observant internet user to have been used by the operators in their own commercial communication. Thus, the Court considered, in the judgment in *Google*,[43] that when a referencing service provider stores, for certain clients, signs which are identical to trade marks as keywords and arranges for the display of advertisements on the basis of those keywords, it is merely carrying out its usual activity and does not therefore appear, in the eyes of an informed internet user who is accustomed to using that tool, to use those signs itself in its own commercial communication. Likewise, the Court considered, in the judgment in *eBay*,[44] that the marketplace operator, in so far as it provides a service consisting in enabling its clients to display, in the course of their commercial activities, such as their sales offerings, signs corresponding to trade marks on its website, does not, from

[42] With regard to the essential functions of the trade mark, see Kur, A. and Senftleben, M., op. cit., p. 6.

[43] Paragraph 53 of that judgment.

[44] Paragraph 102 of that judgment.

the point of view of a reasonably well-informed and reasonably observant user, go beyond its role as an intermediary and does not use those signs in the context of its own commercial communication.

71. In the third place, the Court acknowledged, in the judgment in *eBay*,[45] without however mentioning the condition relating to the use of a sign in a marketplace operator's own commercial communication, that a trade mark is used when such an operator selects in the Google search engine keywords corresponding to a trade mark in order to cause a *promotional* link to appear and a message offering the opportunity to buy on its website goods bearing the trade mark searched for. In such a situation, it is indeed due to the fact that the messages and links which eBay displays also advertise the marketplace as such and, consequently, due to the fact that a reasonably well-informed and reasonably observant internet user perceives the trade mark at issue as forming part of eBay's own commercial communication that the Court held that there was use of that trade mark by eBay.

72. I therefore take the view that the perception of a reasonably well-informed and reasonably observant internet user who uses an online sales platform is a relevant factor in determining whether a sign is used in the commercial communication of the operator of that platform. Such a standard, which presupposes that the user is reasonably well informed and reasonably observant, seems to me to be all the more justified in so far as, for some users of online sales platforms, the identity of the seller is irrelevant and the only criterion for purchase is the product and its price. Such internet users cannot therefore be used as a yardstick to establish whether a sign is perceived not merely as being used by the third-party seller but as being an integral part of the commercial communication of the operator of that platform. It therefore seems to me necessary to refer to the average user, for whom such information is relevant.

73. Lastly, I must also point out that the recognition of the use of a sign for the purposes of Article 9(2) of Regulation 2017/1001 by the seller of a product via an online sales platform does not preclude the intermediary operating that platform from also, in theory, using that sign, where that intermediary uses the sign at issue in its own commercial communication.

74. It is on the basis of those considerations that I shall now analyse the activity of an operator of an online sales platform, as described by the referring courts, in order to determine whether that operator may be considered to be using the trade mark at issue within the meaning of Article 9(2) of Regulation 2017/1001 in so far as it is said to use that trade mark in its own commercial communication.

B. The impact of Amazon's business practices on the recognition of 'use' of the trade mark for the purposes of Article 9(2) of Regulation 2017/1001

75. By the first and third questions in Case C-148/21 and the second question in Case C-184/21, the referring courts seek to ascertain, in essence, whether Article 9(2) of Regulation 2017/1001 must be interpreted as meaning that the operator of an online sales platform must be regarded as using a trade mark in an offer for sale published by a third party on that platform on account of the fact that, first, it publishes both its own commercial offerings and those of third parties uniformly without distinguishing them as to their origin in the way in which they are displayed, by allowing its own logo as a renowned distributor to appear on those advertisements, both on its website and

[45] Paragraphs 84 and 85 of that judgment.

in the advertising categories of third-party websites and, secondly, it offers third-party sellers the additional services of assistance, stocking and shipping of goods posted on its platform by informing potential purchasers that it will be responsible for the provision of those services.

1. Definition of the scope of the questions referred for a preliminary ruling

76. At the outset, it is important for me to point out that the questions mentioned in the previous paragraph concern only the circumstance in which an operator of an online sales platform is directly liable in so far as it has used a sign identical with a trade mark, within the meaning of Article 9 of Regulation 2017/1001. As I mentioned in points 8 and 10 of this Opinion, this question is distinct from that of the indirect liability of online intermediaries as a result of the actions of third parties via their services.

77. The analysis I propose is therefore without prejudice to the possibility, for the referring courts, in so far as an economic operator has enabled the use of a trade mark by another operator, to examine the impact of rules of law other than the one in Article 9 of Regulation 2017/1001.

78. The fact that a sign is incorporated into the commercial communication of the operator of an online sales platform does not mean that that operator is never held liable for the infringement of trade mark proprietors' rights, but only that that liability must be established on the basis of national law, as secondary liability.

79. In such a case, it is for the referring courts to determine, on the basis of national law, whether the online intermediary could be indirectly liable, it being understood that such liability must be reconciled with the exemptions from liability set out in the Directive on electronic commerce.

80. Moreover, the arsenal of measures that can be taken to protect the rights of a trade mark proprietor in respect of an online intermediary which has allowed a third party to make use of a sign via its services is not limited to the liability of that intermediary, be it direct or indirect. The third sentence of Article 11 of Directive 2004/48 thus provides that an injunction may be issued against intermediaries whose services are used by a third party to infringe an intellectual property right.

81. That noted, I shall now endeavour to set out the reasons why I take the view that the operator of an online platform such as Amazon does not use a sign in accordance with Article 9 of Regulation 2017/1001 in the exercise of its activity as described by the referring courts.

2. The Amazon model is specific

82. The first question referred for a preliminary ruling in Case C-148/21 primarily concerns the activity of a marketplace operator of publishing commercial offerings from third-party sellers on its website where those offers for sale display a sign which is identical with a trade mark. As I stated in point 52 of this Opinion, and as Amazon has pointed out, that activity has been found by the Court not to constitute use of that sign for the purposes of Article 9(2) of Regulation 2017/1001. [46]

[46] See judgment in *eBay*.

83. Nevertheless, as the referring court points out in Case C-148/21, the activity of the operator of an online sales platform such as Amazon is different from that of the marketplace operator which was the subject of the judgment in *eBay*. That court thus emphasises the fact that, having regard to the way in which they are displayed, the commercial offerings of the third-party sellers cannot be distinguished from those of Amazon. In addition, it notes that the logo of Amazon, a renowned distributor, appears systematically on all offers for sale, both on the marketplace and on third-party sites as part of advertising messages. Finally, it points out that Amazon itself incorporates those offers for sale in certain shops on its website or in lists of products.

84. However, to me, none of those factors appear to call into question the finding reached by the Court in its judgment in *eBay*. I am of the opinion that those factors are not likely to lead a reasonably well-informed and reasonably observant internet user to perceive the signs in advertisements from third-party sellers to be an integral part of the commercial communication of the operator of the online sales platform.

85. As regards the lack of distinction between commercial offerings from third-party sellers and those from Amazon, it is true that those commercial offerings are presented uniformly and that each includes the logo of Amazon, a renowned distributor. However, as is apparent from the examples of commercial offerings contained in the request for a preliminary ruling in Case C-148/21, I would note that it is always specified in the advertisements whether the products are sold by third-party sellers or sold directly by Amazon.

86. Moreover, while Amazon is a highly renowned distributor, that company is also renowned for its marketplace activity. Users of the platform are therefore aware that both advertisements for goods sold directly by Amazon and advertisements published by third-party sellers are posted. The mere presence of the Amazon logo may therefore be just as likely to indicate to consumers that they are dealing with an advertisement published by a third-party seller. In those circumstances, the mere fact that Amazon's advertisements appear next to those of third-party sellers cannot lead to the finding that a reasonably well-informed and reasonably observant internet user might perceive the signs displayed on the advertisements of third-party sellers as part of Amazon's commercial communication.

87. The same reasoning applies to advertisements published on third-party websites which incorporate Amazon's logo and refer to commercial offerings published on that company's website by third-party sellers.

88. And the same applies to the integration by Amazon of third-party sellers' advertisements into shops on its platform or in lists relating to the best-selling or most popular products. As the Commission points out, that integration is in fact a part of how that platform is organised. Amazon also pointed out at the hearing that that arrangement is automatic: advertisements for similar products are grouped together, and on the basis of the most sought-after or best-selling products. That organisation is therefore an integral part of the role of an online intermediary such as Amazon, as an online marketplace operator, and is only perceived by reasonably well-informed and reasonably observant internet users as a measure relating to the presentation and layout of its platform.

89. By its first question, the referring court in Case C-148/21 also asks the Court whether the fact that Amazon offers a 'comprehensive' service, including providing assistance in preparing advertisements and the stocking and shipment of certain goods, has an impact on the classification of the use of a sign displayed on those advertisements by Amazon.

90. That question is essentially the same as the third question in Case C-148/21 and the second question in Case C-184/21, which seek to determine whether the stocking and shipment of goods bearing a sign identical with a trade mark, in respect of which Amazon has also made an active contribution to the preparation and publication of the offers for sale, constitutes use of the trade mark for the purposes of Article 9(2) of Regulation 2017/1001.

91. In order to respond to those questions, it is therefore necessary, as the German Government points out, to analyse Amazon's activities as a whole in order to determine whether the involvement of that company, from the publication of the advertisement bearing the sign at issue to the shipping of the product in question, might be classified as use of that sign. I believe that that is not the case.

92. Admittedly, such involvement, which is specific to Amazon's operation, is likely, at least in principle, to give that company greater control over the sale of a product which infringes a trade mark. However, that involvement, which is for the benefit of the consumer in that it is, in fact, intended to ensure prompt and guaranteed delivery after a product is purchased and thereby to strengthen the reputation of the online sales platform, is not sufficient, in my view, to establish that Amazon has used the sign at issue in its own commercial communication.

93. The Court has already held, in the judgment in *Coty*,[47] that a sign cannot be regarded as having been used in the marketplace operator's own commercial communication where that operator stocks goods bearing a sign on behalf of a third-party seller without itself pursuing the aim of offering those goods or putting them on the market. I can see no reason why a different finding should be reached when that operator sends such products on behalf of a third party. In such a situation, it remains clear to reasonably well-informed and reasonably observant internet users that it is the third party seller alone who intends to offer the goods and put them on the market.[48]

94. That conclusion is not undermined by the fact that Amazon itself publishes the advertisements in question. As I have explained, I am of the opinion that the publication of those advertisements does not constitute an act of use for the purposes of Article 9(2) of Regulation 2017/1001.[49] Two acts which do not constitute use for the purposes of that provision cannot, in my view, be assessed differently solely because they are analysed as a whole.

95. In those circumstances, I am of the view that the answer to the questions submitted to it for a preliminary ruling by the referring courts in Cases C-148/21 and C-184/21 should be that Article 9(2) of Regulation 2017/1001 must be interpreted as meaning that the operator of an online sales platform cannot be regarded as using a trade mark in an offer for sale published by a third party on that platform on account of the fact that, first, it publishes both its own commercial offerings and those of third parties uniformly, without distinguishing them as to their origin in the way in which they are displayed, by allowing its own logo as a renowned distributor to appear on those advertisements, both on its website and in the advertising categories of third-party websites and, secondly, it offers third-party sellers the additional services of assistance, stocking and shipping of goods posted on its platform by informing potential purchasers that it will be responsible for the provision of those services, provided that such elements do not lead the reasonably well-informed and reasonably observant internet user to perceive the trade mark in question as an integral part of the operator's commercial communication.

47 Paragraphs 45 to 47 of that judgment.

48 Judgment in *Coty*, paragraph 47.

49 See point 84 et seq. of this Opinion.

3. The specific nature of trade mark law

96. Such a solution implies that the specific features of the business practices of an operator of an online sales platform such as Amazon, which has integrated a package of services from the publication of offers for sale to the shipping of the products in question, has no impact on the concept of 'use' for the purposes of Article 9 of Regulation 2017/1001.

97. However, that approach is confined to the interpretation of that concept and cannot be extended to other areas. In other words, although the integration of various services by the operator of an online sales platform does not, in itself, imply that that operator may be regarded as using a sign even if such integration may entail a more active role, that does not mean that such integration has no bearing on the classification of the services provided by that operator in other areas of law.

98. I am thinking in particular of the approach adopted by the Court in the cases which gave rise to the Court's judgments in *Asociación Profesional Elite Taxi*[50] and *Uber France*.[51] It is apparent from those judgments that the integration of several services provided by an undertaking enabling it to exercise control over all the important aspects of an urban transport service means that such a service must be regarded not as a mere intermediary service aimed at connecting passengers with drivers, but as a single service for which that undertaking is responsible. In other words, the greater control exercised by the undertaking over all aspects of a service has a definite impact on the role of that undertaking as an intermediary, in particular from the point of view of the rules of EU law on electronic commerce.

99. However, that reasoning cannot be transposed in respect of the interpretation of the concept of 'use', such as the one at issue here. Under that interpretation, it is not a question of classifying the service provided by the operator of an online sales platform, but of determining whether its activity is likely to make it appear to be using a sign in its own commercial communication. Those two questions are therefore necessarily answered following a different line of reasoning.

100. They also follow different rationales. The classification of the service provided by an internet service provider is likely to have an impact on its liability towards the user of the platform it operates. It is easy to understand that the more control the provider exercises over the service provided, the greater the liability it incurs. That is not the case with regard to the question whether that provider uses a trade mark in accordance with Regulation 2017/1001, since such a question seeks only to protect the rights of the proprietor of the trade mark in question.

V. Conclusion

101. In the light of all the foregoing considerations, I propose that the Court answer the questions submitted to it for a preliminary ruling by the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg), in Case C-148/21, and by the tribunal de l'entreprise francophone de Bruxelles (Brussels Companies Court (French-speaking), Belgium), in Case C-184/21, to the effect that Article 9(2) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark must be interpreted as meaning that the operator of an online sales platform cannot be regarded as using a trade mark in an offer for sale published by a third party on that platform on account of the fact

[50] Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

[51] Judgment of 10 April 2018 (C-320/16, EU:C:2018:221).

that, first, it publishes both its own commercial offerings and those of third parties uniformly without distinguishing them as to their origin in the way in which they are displayed, by allowing its own logo as a renowned distributor to appear on those advertisements, both on its website and in the advertising categories of third-party websites and, secondly, it offers third-party sellers the additional services of assistance, stocking and shipping of goods posted on its platform by informing potential purchasers that it will be responsible for the provision of those services, provided that such elements do not lead the reasonably well-informed and reasonably observant internet user to perceive the trade mark in question as an integral part of the operator's commercial communication.